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Copyright Royalty Board

37 CFR Part 380

[2005-1 CRB DTRA (Webcasting II)]

Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final Determination after Second Remand.

SUMMARY: The Copyright Royalty Judges are announcing their final determination upholding the validity and application of the \$500 minimum fee for noncommercial webcasters for the licensing period 2006 through 2010. The judges issued the determination in response to a second order of remand by the United States Court of Appeals for the District of Columbia Circuit. Their review of the evidence was *de novo*. The judges issued their initial determination in March 2014 and received no motions for rehearing.

DATES: *Effective date:* [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

Applicability date: The fee applies to the license period January 1, 2006, through December 31, 2010.

ADDRESSES: The determination is also published on the agency's website at www.loc.gov/crb. For related matters see also the Federal eRulemaking Portal at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Kim Whittle, Attorney Advisor, (202) 707-7658 or crb@loc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The captioned matter began with a notice in the **Federal Register** in February 2005. In that notice, the Copyright Royalty Judges (Judges) commenced a rate-setting proceeding and solicited Petitions to Participate. *See* 70 FR 7970 (February 16, 2005). The aim of the proceeding was to establish royalty rates and terms, including the establishment of minimum fees, applicable to entities making ephemeral recordings of copyrighted sound recordings and digitally performing those recordings¹. The Judges set rates and terms for use of the rights during the period 2006 through 2010, publishing their Final Determination on May 1, 2007. 72 FR 24084 (May 1, 2007) (*Web II*).

Intercollegiate Broadcasting System, Inc. (IBS) appealed the Judges' determination to the U.S. Court of Appeals for the D.C. Circuit. The D.C. Circuit remanded the Judges' determination of the minimum fee established for noncommercial webcasters, *viz.* \$500 per year per station or channel, citing insufficient evidence in the record to substantiate the \$500 minimum fee. On May 18, 2010, after granting the parties leave to engage in additional briefing and discovery, the Judges held a further hearing on remand. Following the remand hearing, the Judges issued their determination on September 17, 2010. 75 FR 56873 (Sept. 17, 2010).

¹ Owners of rights in sound recordings are subject to compulsory licenses under the Copyright Act. *See, e.g.,* 17 USC 112(e) (ephemeral recordings), 114 (d)(2), (3) (transmission). The Judges are tasked to adjudicate, *inter alia*, disputes relating to licensing fees. *See, e.g.,* 17 USC 112(e)(3), (4), 114(f), 801, 803, 804.

IBS again appealed the Judges' determination. During the pendency of the *Web II* appeal, the Judges issued a final determination regarding rates and terms for the same licenses for the period 2011 through 2015.² (*Web III*). IBS appealed the Judges' *Web III* determination challenging again the \$500 minimum fee and asserting that appointment of the Judges violated the Appointments Clause of the U.S. Constitution. Given the overlap of issues and the introduction of a constitutional challenge, the D.C. Circuit stayed further proceedings on appeal in *Web II*.

The D.C. Circuit decided *Web III* and concluded that the Judges' appointments were unconstitutional. The D.C. Circuit struck portions of the Copyright Act that it determined to be unconstitutional and the Librarian of Congress appointed a panel of Judges consistent with the altered statute. The D.C. Circuit remanded *Web III* for further proceedings³ by a constitutionally valid panel of Judges. After the *Web III* remand, on motion of the *Web II* parties, the D.C. Circuit vacated and remanded the *Web II* matter.⁴

The issue before the Judges is determination of the validity and application of the \$500 minimum fee for noncommercial webcasters for the period 2006 through 2010. The Judges, after notice to the parties, concluded that they should reach this determination, to the extent a new determination is required, under section 803(b)(5) (paper proceedings) after a *de novo* review of the record.

For all of the reasons discussed herein, the Judges determine that the minimum fee for noncommercial webcasters for the license term 2006 through 2010 shall be and remain \$500 per station or channel, applicable to the annual flat fee royalties payable for

² See 76 FR 13026 (Mar. 9, 2011) (*Web III*).

³ *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Board*, 684 F.3d 1332, 1342 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 2735 (2013).

⁴ *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Board*, No. 10-1314 (D.C. Cir. Sept. 30, 2013) (order granting joint motion for vacatur and remand).

usage of sound recordings for up to 159,140 Aggregate Tuning Hours (ATH) per month. The Judges assert that the question on remand is moot. Nonetheless, the Judges detail in this determination reasons sufficient to uphold their decision on the merits, to the extent required.

The Judges issued their Initial Determination on Second Remand on March 11, 2014. No party moved for rehearing. Accordingly, the Judges now issue their Final Determination in this matter.⁵

II. The Judges Conclude that the Issue on Remand is Subsumed by the Affirmance of the Flat Royalty Rate of \$500.

IBS argues in this remand proceeding that the Judges should eliminate, or significantly reduce, the \$500 minimum fee for noncommercial webcasters that the Judges adopted and the D.C. Circuit remanded in the *Web II* Determination. That minimum fee was in effect for the period 2006 through 2010, and thus *expired more than three years ago*. Any change to the minimum fee at issue in this remand proceeding would have no prospective effect whatever on the rates that noncommercial webcasters pay. If a decision by the Judges in IBS's favor at this stage were to have any effect at all, it would be by requiring a retrospective adjustment of noncommercial webcasters' payment obligations (*e.g.*, a refund of minimum fees already paid). Such a remedy would be warranted only if a reduction in the minimum fee would also result in a reduction of a noncommercial webcaster's total payment obligation.

The minimum fee that a webcaster pays is only one component of the webcasters' total payment obligation under the section 114 and section 112(e) statutory licenses. The

⁵ The Register of Copyrights completed her review of this determination on October 20, 2014, and stated that "[n]o correction or any further actions will be taken by the Register on this matter." See 17 U.S.C. 802 (f)(1)(D).

Final Determination established a rate structure for noncommercial webcasters that consisted of a flat annual fee of \$500 for the first 159,140 ATH of usage per month, 37 CFR 380.3(a)(2)(i) (2008), plus a per-performance rate equal to the commercial rate for usage in excess of 159,140 ATH per month. 37 CFR 380.3(a)(2)(ii) (2008). In addition, noncommercial webcasters were subject to the contested \$500 annual minimum fee. The minimum fee was non-refundable, but recoupable against the \$500 flat royalty fee. 37 CFR 380.3(b) (2008); *see also Final Determination*, 72 FR at 24100.⁶

Because the \$500 minimum fee was recoupable, a noncommercial webcaster's single payment of \$500 satisfied both the *minimum fee* and the \$500 *flat rate* for the first 159,140 ATH of monthly usage. Nonetheless, the flat rate and the minimum fee are separate and distinct components of the rate structure, codified in separate sections of the Code of Federal Regulations.

In its decision of the appeal of the Final Determination, the D.C. Circuit “vacate[d] the \$500 minimum fee” for both commercial⁷ and noncommercial webcasters and “remand[ed] that portion of the determination to the Copyright Royalty Judges for further proceedings not inconsistent with this opinion.” 574 F.3d at 772. “All other portions of the determination [were] affirmed.” *Id.*; *accord id.* at 753.

The plain language of the D.C. Circuit's remand order demonstrates that the court affirmed the flat rate component of the rate structure for noncommercial webcasters. Even if the Judges were to reduce the minimum fee retroactively, noncommercial webcasters' obligation to pay a flat royalty rate of \$500 annually would be unaffected.

⁶ This minimum fee, codified in 37 CFR 380.3(b) (2008), applies to both commercial and noncommercial webcasters.

⁷ The commercial webcasters and SoundExchange reached a settlement after the Final Determination was remanded, which the Judges adopted, leaving only the minimum fee for noncommercial webcasters for the Judges to determine in this remand proceeding. *See* 75 FR 6097 (Feb. 8, 2010).

Consequently, a decision in IBS's favor on the minimum fee issue would have no effect on noncommercial webcasters' total payment obligations. That is, given that the \$500 payment satisfied both the *minimum fee* and the \$500 *flat rate* for the first 159,140 ATH of usage, IBS and its constituents would realize no benefit, even if the Judges were to reduce the minimum fee, thereby eliminating any actual issue for adjudication. The Judges conclude, therefore, that the instant matter has been rendered moot and that IBS lacks a "significant interest in the proceedings" as required by section 803(b)(2)(C) of the Act.

III. Assuming the Issue on Remand States an Issue for Adjudication, the Judges' Determination on Remand is Narrowed by the Directive from the D.C. Circuit

A. The First Remand

In vacating and remanding the Judges' original *Web II* Determination with regard to the "Minimum Annual Fee"⁸ for noncommercial webcasters subject to the statutory license, the D.C. Circuit held:

Because there is *no record evidence* that \$500 represented SoundExchange's administrative cost per channel or station, the Judges' determination in this regard cannot be sustained.

Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board, 574 F.3d 748, 767 (D.C. Cir. 2009) (emphasis added). The basis for the Court's holding was that, in the absence of sufficient evidence, "the \$500 minimum fee was *arbitrary, capricious and not supported by record evidence*" *Id.* at 772 (emphasis added).

Accordingly, the D.C. Circuit "remand[ed] the issue of the appropriate minimum fee for noncommercial." *Id.* at 767. To allow for a cure of this defect on remand, the

⁸ The rates and terms established by the Judges "shall include a minimum fee" 17 U.S.C. 114(f)(2)(B).

D.C. Circuit instructed the Judges to undertake “further proceedings not inconsistent with this opinion,” *id.*, which required the Judges to receive and consider *new* “record evidence” of “SoundExchange’s administrative cost per channel or station.” *Id.* at 767 (emphasis added).

For the first remand, the Judges permitted the Participants to submit additional papers and to engage in supplemental discovery. Thereafter, on May 18, 2010, the Judges conducted the remand hearing required by the D.C. Circuit. To the extent this second remand presents an issue for adjudication, the current, reconstituted panel of Judges has conducted a *de novo* review of the evidence and transcripts of the first remand and analyzed the propriety of the annual \$500 minimum fee per station or channel.

B. The Participants’ Witnesses and Relevant Evidence

In the first remand proceeding, SoundExchange, as the collective representing the licensors, presented the written and oral testimony of W. Tucker McCrady, a member of its Licensing Committee, which, is directly responsible for negotiating and approving any settlements related to statutory licenses on behalf of SoundExchange. McCrady WDT at 1. Mr. McCrady is also associate counsel, digital legal affairs, for Warner Music Group (WMG). *Id.* SoundExchange also presented the written and oral testimony of Barrie Kessler, its chief operating officer. SoundExchange also introduced into evidence agreements it reached pursuant to the Webcaster Settlement Acts of 2008 and 2009, with (i) College Broadcasters, Inc. (CBI) for noncommercial educational webcasters; (ii) National Association of Broadcasters (NAB) for broadcasters who also webcast performances of sound recordings; (iii) Sirius XM Radio, Inc. (Sirius XM) for webcasts

of signals provided by satellite services; and (iv) DiMA for commercial webcasters. 5/18/10 Tr. at 13 (McCrary).

IBS represents a membership of more than 1,000 student-staffed stations and webcasting operations affiliated with domestic academic institutions, and purports to be the largest such organization in the United States. Frederick J. Kass, Jr. (Pre-Remand) WDT at ¶ 6. IBS presented its case principally through the written and oral testimony of Captain Kass, treasurer, director of operations (chief operating officer), and a director of IBS.⁹ In addition, IBS presented the written testimony of John E. Murphy, general manager of WHUS, a university radio station at the University of Connecticut, and Benjamin Shaiken, at the time a student at the University of Connecticut and operations manager of WHUS.

C. The Minimum Fee Proposals of the Participants

1. The SoundExchange Proposal

SoundExchange proposed the same dollar level for a minimum fee for noncommercial webcasters, \$500, as it had proposed prior to the first remand. Specifically, SoundExchange proposed:

Each Noncommercial Webcaster will pay an annual, nonrefundable minimum fee of \$500 for each calendar year or part of a calendar year of the license period during which they are [*sic*] Licensees pursuant to licenses under 17 U.S.C. 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Noncommercial Webcasters and is also payable for each individual Side Channel maintained by Broadcasters who are Licensees. The minimum fee payable under 17 U.S.C. 112 is deemed to be included within the minimum fee payable under 17 U.S.C. 114. Upon payment of the minimum fee, the Licensee will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

⁹ Frederick Kass is also retired from the United States Navy, having achieved the rank of Captain. Kass (Pre-remand) WDT ¶ 1. Accordingly, the Judges refer to him in this Determination as Captain Kass.

Proposed Rates and Terms of SoundExchange, Inc. for the Remand Proceeding Concerning the Minimum Fee Payable by Noncommercial Webcasters (Jan. 11, 2010).

Consistent with the Judges' prior ruling in *Web II*, SoundExchange's proposed minimum fee would be "fully recoupable" against royalty fees owed by noncommercial webcasters subject to the statutory license. 5/18/10 Tr. at 14 (McCrady).

2. The IBS Proposal

IBS proposed that certain smaller noncommercial webcasters be exempt from paying any minimum fee. 5/18/10 Tr. at 76, 83–85 (Kass); Kass (Supplemental) WDT at 2 (For certain smaller noncommercial webcasters, "[t]he imposition of a minimum fee should be rejected by the Judges.")¹⁰ More particularly, IBS proposed that an exemption from the minimum fee be provided to webcasters that met IBS's proposed (and unprecedented) classification as either "Small Noncommercial Webcasters," defined by IBS as those whose total performances of digitally recorded music is less than 15,914 ATH per month, or "Very Small Noncommercial Webcasters," defined by IBS as those whose total performances of digitally recorded music is less than 6,365 ATH per month. *IBS's Restated Rate Proposal* (June 1, 2010). IBS did not propose a separate minimum fee for noncommercial webcasters who performed more than 15,914 ATH per month, nor did IBS object to SoundExchange's proposed minimum fee for noncommercial webcasters who webcast more than 15,914 ATH per month.

¹⁰ Because the D.C. Circuit remanded for a determination of "the issue of the appropriate minimum fee for noncommercial," the Judges construe the IBS proposal as a request for a minimum of fee of zero. The Judges do not reach the question whether a minimum fee of \$0 could ever satisfy the statutory mandate to "include a minimum fee for each . . . type of service . . ." 17 U.S.C. 114(f)(2)(B).

In addition, IBS raised issues that went beyond the scope of the remand instructions of the D.C. Circuit.¹¹

D. The Participants' Testimony and Evidence

1. SoundExchange's Testimony and Evidence

SoundExchange – through Ms. Kessler's testimony – provided precisely the type of evidence required by the D.C. Circuit in its remand instructions. That is, Ms. Kessler testified regarding the costs incurred by SoundExchange to administer the royalty payment and distribution process under the statutory license. As Ms. Kessler testified, broadly speaking, "there is not necessarily much difference between a noncommercial service and a commercial service in terms of the effort required for [SoundExchange] to administer ... use of sound recordings." Kessler Corrected WDT at 3.

Ms. Kessler testified that 305 noncommercial webcasters paid the minimum fee of \$500 in 2009. Kessler Corrected WDT at 3; 5/18/10 Tr. at 34 (Kessler).¹² According to Ms. Kessler, by making these payments, the noncommercial webcasters demonstrated that they were able and willing to pay the minimum fee. 5/18/10 Tr. at 33 (Kessler).

According to Ms. Kessler, SoundExchange does not track the administrative costs on a licensee, station, or channel basis in the ordinary course of business. 5/18/10 Tr. at 37 (Kessler). However, for this remand proceeding, SoundExchange estimated its

¹¹Specifically – and separate and apart from the minimum fee issue – IBS also requested for these proposed new classes of noncommercial webcasters: (1) a new flat royalty *rate* of \$50 per annum for the noncommercial webcasters IBS classified as "Small"; (2) a new flat royalty *rate* of \$20 per annum for the noncommercial webcasters IBS classified as "Very Small"; and (3) new *terms* that would exempt both such proposed classes from recordkeeping and reporting requirements. *By seeking different royalty rates and terms, IBS has raised issues that go beyond the scope of the remand instructions.* Indeed, as the D.C. Circuit made clear, except for the minimum fee issue, "[a]ll other portions of the determination are affirmed." 574 F.3d at 772 (emphasis added).

¹² The remaining 58 noncommercial webcasters also were charged the \$500 minimum fee, but they recouped that minimum fee either because they exceeded the ATH threshold cap or because they streamed multiple channels or stations.

administrative costs and found that the average per channel or station cost for webcasters for 2008 was \$803. 5/18/10 Tr. at 36 (Kessler); Kessler Corrected WDT at 9-10.

Further, Ms. Kessler testified that this average cost exceeded the average revenue derived by SoundExchange from noncommercial webcasters. 5/18/10 Tr. at 34 (Kessler).

Ms. Kessler testified that, for all licensees, regardless of size or classification, SoundExchange must perform certain basic processes to administer the collection and distribution of royalty fees related to use of sound recordings. She also testified that that there was no positive correlation between the volume of sound recordings performed by a station or channel and the administrative work required of SoundExchange, nor, as noted *supra*, was there a greater amount of time and effort expended to administer the licensing process for commercial webcasters compared to noncommercial webcasters.¹³ In fact, as Ms. Kessler testified, SoundExchange “at times has to devote more time to working with a noncommercial service than it would a commercial service, because of the small and often inexperienced staff and relative lack of automation in the operations of many noncommercial webcasters.” Kessler Corrected WDT at 4.

Moreover, SoundExchange’s additional documentary evidence regarding the minimum fee contained in other agreements was consistent with the use of the \$500 minimum fee in this proceeding. All of the agreements filed pursuant to the Webcaster Settlement Acts of 2008 and 2009 and introduced into evidence by SoundExchange contained minimum fees similar to the \$500 per station or channel proposed by

¹³According to Ms. Kessler, although the particular per channel or station costs deviate from the average (by definition, the value of each item within a heterogeneous set will deviate from the set’s average value), those deviations are not a function of the classification of the service as commercial or noncommercial. Rather, those deviations are a function of the amount of “time and attention” required of SoundExchange to administer the license, which itself is a function of the quality of the data provided by the service operating the channel or station. 5/18/10 Tr. at 37-38 (Kessler).

SoundExchange. Of particular importance, one of those agreements was the agreement between SoundExchange and noncommercial educational webcasters (the CBI Agreement) for the same type of services as would be covered under the IBS proposal. More specifically, the CBI Agreement contains *the identical minimum fee of \$500 per year per station or channel*. 5/18/10 Tr. at 14 (McCrady).

Mr. McCrady testified that this proposed \$500 minimum fee represented a substantial discount for noncommercial webcasters. Specifically, Mr. McCrady testified that – with regard to *Commercial* Webcasters – WMG required that its negotiated voluntary licenses for its full catalogue must generate payments anticipated to be at least \$25,000. 5/18/10 Tr. at 25 (McCrady), and the lowest commercial minimum fee is 20% of revenue. 5/18/10 Tr. at 20 (McCrady). On percentage terms, therefore, the \$500 minimum fee would represent a substantial discount because – accepting *arguendo* IBS’s assertion that the average annual operating budget of its member stations is \$9,000, *see* 5/18/10 Tr. at 20 (McCrady) and 5/18/10 Tr. at 71 (Kass) – that proposed \$500 minimum fee would be less than 6% of that amount.

2. IBS’s Testimony and Evidence

IBS’s primary contention to support a zero minimum fee for “Small” and “Very Small” noncommercial webcasters is essentially that those entities are unable to afford the \$500 minimum fee proposed by SoundExchange. 5/18/10 Tr. at 103 (Kass). More specifically, Capt. Kass testified that, according to a prior survey by IBS of its member stations – a survey undertaken “back away” and not proffered by IBS – the average annual operating budget for those campus stations was approximately \$9,000 per year. 5/18/10 Tr. at 71 (Kass); Kass (Pre-Remand) WDT at 9.

Messrs. Kass, Murphy, and Shaiken all testified about certain distinctions between college (and, to a lesser extent, high school) radio stations and commercial radio stations. Kass (Pre-Remand) WDT at ¶¶ 7-8; 10-13; 4/22/10 Tr. at 761, 765(Kass); Murphy WDT at ¶¶ 4-10; Shaiken WDT ¶¶ 5-9.¹⁴ The gravamen of these asserted distinctions was that smaller webcasters affiliated with educational institutions have an instructional need for sound recordings that, according to IBS, must be distinguished from the demand of other webcasters, in a manner that would preclude any minimum fee.

However, the evidence and testimony introduced by IBS did not address the issue of whether SoundExchange incurred administrative costs in connection with licensing of sound recordings performed by academic institutions, or the dollar value of such administrative costs.

E. Analysis and Determination

The Judges concluded in the first remand that SoundExchange's \$500 minimum fee proposal is clearly appropriate and eminently reasonable. The Judges in this remand reach the same conclusion and find several bases in the record for this conclusion.

First, *IBS did not proffer any evidence to contradict Ms. Kessler's testimony.* Accordingly, the Judges find as a fact that the cost to administer the statutory license, including for the noncommercial webcasters represented by IBS, is \$803 per year on average. It is reasonable and appropriate for the minimum fee at least to cover SoundExchange's administrative cost. Moreover, as noted at the outset of this Determination, the D.C. Circuit expressly remanded the prior Determination with a

¹⁴ The written testimony of Messrs. Murphy and Shaiken were introduced previously in *Web III* on April 22, 2010, and were subsequently designated as evidence by IBS and admitted in the first *Web II* remand proceeding. 5/18/10 Tr. at 66-67.

directive that the Judges develop just such a record regarding SoundExchange's administrative costs, in order to ground a decision as to the minimum fee on evidentiary bases.¹⁵

Second, the CBI Agreement admitted into evidence is persuasive corroborating evidence. The CBI Agreement confirms that SoundExchange's proposal represents a minimum fee that has actually been *negotiated in the marketplace* between a willing buyer and a willing seller. The Judges further note that the negotiated CBI Agreement employs the same minimum fee per station or channel, up to the 159,140 ATH threshold, without the smaller sub-classifications proposed by IBS.

Third, the undisputed fact that 305 noncommercial webcasters paid the \$500 minimum fee in 2009 is persuasive evidence that this minimum fee has not only been included in an agreement, but has *actually been paid in the marketplace*. Just as webcasting rates (beyond a minimum fee) must represent marketplace rates, so too should a statutory minimum fee bear a relationship to the minimum fees that actually are paid for similar services.

In stark contrast, the testimony and evidence proffered by IBS do not present any countervailing considerations.

First, IBS proffered no record evidence to support the contention that the "Small" or "Very Small" noncommercial webcasters as defined by IBS would be unable to pay a \$500 minimum fee. Indeed, IBS did not offer testimony from any entity that

¹⁵ The Judges note that, as Mr. McCrady testified, generally, minimum fees "are intended not only to cover our costs of negotiating and administering the license, but to assure that we will receive a substantial guaranteed stream of revenue for making available our large repertoire of sound recordings." McCrady WDT at 5. Although in the present proceeding the minimum fee has been based on the administrative costs incurred by SoundExchange, nothing set forth herein should be construed as precluding a minimum fee from also serving to guarantee a stream of revenue for licensees as appropriate in the particular proceeding.

demonstrably qualified as a “Small” or “Very Small” noncommercial webcaster. Mere conclusory statements that a \$500 minimum payment would be unaffordable for smaller noncommercial webcasters do not serve as probative evidence.

Second, the only testimony that mentions any specifics about the finances of smaller webcasters is the reference by Capt. Kass to the survey performed “back away” that supposedly showed that IBS members had an average annual operating budget of \$9,000. Kass (Pre-Remand) WDT at ¶ 9. IBS did not offer that purported survey into evidence. Without documentary evidence that would allow the Judges to assess the validity of the survey, the Judges cannot accept Capt. Kass’s reference to that survey as evidence. *See* 37 CFR 351.10(e). Moreover, assuming *arguendo* the Judges could accept such a casual reference as probative, the assertion would not advance IBS’s case. On its face, an assertion that the average operating budget for IBS members is \$9,000 does not establish that its members lack the capacity to make a minimum payment of \$500.

Third, the evidence strongly suggests that the ATH cutoffs that IBS proposed for “Small” and “Very Small” noncommercial webcasters are arbitrary. It appears that, for these proposed smaller categories, IBS chose ATH levels that represent 10% and 4%, respectively, of the ATH cutoff (159,400 ATH) for all noncommercial webcasters contained in SoundExchange's rate proposal. *IBS's Restated Rate Proposal* (June 1, 2010). Nothing in the record substantiates these ATH levels as probative of the ability, *vel non*, of a noncommercial webcaster to pay a \$500 minimum fee.

Fourth, even if there were a sufficient basis in the record to conclude that “Small” and/or “Very Small” noncommercial webcasters were unable to pay a \$500 minimum fee, that alone would not demonstrate that a willing seller in a hypothetical marketplace

would be prepared to offer a lower minimum fee. That proposition is particularly dubious in this proceeding given the evidence in the record (discussed *supra*) that SoundExchange's average annual administrative cost exceeds \$500 per station or channel.

Fifth, the particular economic circumstances of the academic webcasters represented by IBS are germane *only* to the determination of the statutory royalty rate that they are required to pay – a royalty determination previously rendered by the Judges and affirmed by the D.C. Circuit. Indeed, the prior Determination by the Judges, affirmed by the D.C. Circuit, acknowledged the appropriateness of lower *rates* for noncommercial webcasters compared to the rates set for commercial webcasters. The issue at hand on this remand is different – whether there should be a distinction regarding the *minimum fee* – not the royalty rate – among different groups *within* the category of noncommercial webcasters.¹⁶

Finally, the testimony of the IBS witnesses regarding the nature of the use of sound recordings¹⁷ by academic institutions is not pertinent to the setting of the minimum fee based on SoundExchange's administrative costs. That is, payment of a minimum fee of zero, and indeed any minimum fee significantly below SoundExchange's actual administrative costs, would provide a webcaster with an unjustified free ride¹⁸ in terms of

¹⁶ The contrast between the *economic* value of a sound recording and the *economic* value of administrative services is instructive in this regard. Administrative services, like any private services or goods, are priced in a market at a level that permits the seller to recover at least its average variable cost of providing those services. By contrast, the marginal cost of producing an additional copy of a sound recording is essentially zero, so the determination of the price for the sound recording, on the supply side, is influenced by that economic fact (and by the recurring sinking of long-term costs to create the recording and the need to provide an incentive for the creation of future sound recordings). Noncommercial webcasters might have been able to argue for a *different or lower royalty rate* based on this economic argument, but the Judges cannot apply this principle to the valuation of a service, such as the provision of administrative functions that, like all private goods or services, are provided at a positive marginal cost.

¹⁷ Pursuant to 17 U.S.C. 114(f)(2)(B), the Judges can identify and then account for those differences in the “nature of the use of sound recordings” that would support a different rate or term.

¹⁸ “Small” and “Very Small” noncommercial webcasters would obtain a free ride under the IBS proposal because they receive benefits from SoundExchange's administrative services. As explained by Mr.

the cost of administering the license, because SoundExchange incurs that cost *regardless of the nature of the use of the sound recording*.¹⁹

IV. Conclusion

For the foregoing reasons, developed from a *de novo* review of the record, the Judges conclude that the \$500 minimum fee proposed by SoundExchange for all noncommercial webcasters for the license term 2006 through 2010 is appropriate and consistent with the relevant willing buyer/willing seller statutory standard. The Judges hereby expressly adopt the same minimum fee as set forth in the Final Determination published on May 1, 2007, and the Order on Remand. See 37 CFR 380.3(b)(2). The Judges also conclude that IBS failed to support the zero minimum fee that it proposed for sub-categories of noncommercial webcasters, either with relevant evidence or economic analysis consistent with the applicable statutory standard.

September 17, 2014.

SO ORDERED.

Suzanne M .Barnett,
Chief United States Copyright Royalty Judge.

McCrady, rather than having to negotiate licenses with individual copyright owners in a market without a statutory license, noncommercial webcasters enjoy “one-stop shopping” for rights to all recordings at a pre-established price. McCrady WDT at 11.

¹⁹ The Judges do not rely upon Mr. McCrady’s testimony regarding the nature of the use of the sound recordings by academic institutions. He testified that the \$500 minimum fee is appropriate because it provides an important educational message for students regarding the value of recorded music and the need to pay for it. 5/18/10 Tr. at 23 (McCrady). Mr. McCrady did not purport to be an educator, he did not claim any direct knowledge of the scope or content of the educational work undertaken by academic institutions that authorize their students to play sound recordings, and SoundExchange did not proffer evidence to indicate that Mr. McCrady possessed the competency to testify as to any relationship between the educational mission of these institutions and the establishment of a minimum fee. Although such a “message” might well be appropriate as part of an economics or business school class or internship, that message might not be part of the curriculum in a music or communications class or internship. Further, a student’s understanding of the economic issues regarding the pricing of sound recordings cannot be imparted in such an *ad hoc* manner.

David R. Strickler
United States Copyright Royalty Judge.

Jesse M. Feder
United States Copyright Royalty Judge.

Dated: October 22, 2014.

Suzanne M. Barnett,
Chief United States Copyright Royalty Judge.

Approved by:

James H. Billington,
Librarian of Congress.

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